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IN THE

Supreme Court of the United States

October Term, 1973

No. 73 - 396

WALLACE REED, *et al.*, *Petitioners,*

vs.

ROGERS C. B. MORTON, Secretary of the Interior, *et al.*, *Respondents.*

UNITED STATES OF AMERICA, *Respondent,*

vs.

HOOD CORPORATION, *et al.*, *Petitioners.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	3
Questions Presented for Review	3
Constitutional Provisions, Federal Statutes and Regulations Involved	4
Statement of the Case	4
Reasons for Granting the Writ	13
A. The Court of Appeals' Decision Conflicts With Longstanding Authority	14
B. The Lower Court Decision Departs From the Usual Course Taken in Judicial Proceedings	20
1. The Function of the Trial Court Has Been Completely Subverted	20
2. Decisions of the Department of Interior Must at Some Stage Become Final and Are, in Any Event, Subject to Judicial Review	22
3. The Decision of the Court Below Sanctions Oppressive and Unlawful Conduct	22
4. It Was Error for the Government to Ignore Its Prior Stipulation	23
5. The Government Was Correctly Estopped by the District Court	24
6. The Entrymen Have Been Deprived of Property Without Due Process of Law	24
Conclusion	26

INDEX TO APPENDIX

Page

Appendix. Constitutional Provisions, Federal Statutes and Regulations ..... App. p. 1

Amendment V—Constitution of the United States 1

5 U.S.C. §§552, 554, 701, 702 and 706 1

28 U.S.C. §1345 10

43 U.S.C. §§321, 324, 327, 328 and 329 10

43 C.F.R. 1843.9, 1844.1 and 2521.4(d) 15

TABLE OF AUTHORITIES CITED

Cases	Page
Adams v. Church, 193 U.S. 410 (1904)	16
Adams v. Witmer, 271 F.2d 29 (9th Cir. 1959)	23
Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970)	24
Connor v. United States, 214 Fed. 522 (9th Cir. 1914)	17, 21
Noble v. Union River Logging R. Co., 147 U.S. 165 (1893)	24
Pallinger v. U.S. ex rel. Frost, 216 U.S. 240 (1910)	24
Payne v. Central Pac. Ry. Co., 255 U.S. 228 (1921)	22
United States v. Barber Lumber Co., 172 Fed. 948 (1909)	20, 21
United States v. Barber Lumber Co., 194 Fed. 24 (9th Cir. 1912)	17
United States v. Biggs, 211 U.S. 507 (1908)	17
United States v. Fallbrook Public Utility Dist., 165 F.Supp. 806 (S.D. Cal. 1958)	23
United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970)	24
United States v. Kettenbach, 208 Fed. 209 (9th Cir. 1913)	17
United States v. Mackintosh, 85 Fed. 333 (8th Cir. 1898)	14, 15, 17
United States v. Maxwell Land-Grant Co., 121 U.S. 325 (1887)	21
United States v. O'Leavy, 63 I.D. 341 (1956)	23

Page

United States v. United Verde Copper Co., 196 U.S. 207 (1904) 22

United States v. Williamson, 207 U.S. 425 (1908) 16

Williams v. Kirk, 38 I.D. 429 (1910) 21

Miscellaneous

House of Representatives Report No. 788, 50th Cong., 1st Sess. (1888) 16

Senate Report No. 431, 60th Cong., 1st Sess. (1908) 16

Publications

Code of Federal Regulations, Title 43 (1965), Sec. 1843.9 .....4, 18, 22

Code of Federal Regulations, Title 43 (1965), Sec. 1844.1 .....4, 23

Code of Federal Regulations, Title 43, Sec. 2521.4 (d) 4, 20

Statutes

Act of March 31, 1891, C.H. 561, Sec. 2, 26 Stat. 1096 16

United States Code, Title 5, Sec. 552 .....4, 23

United States Code, Title 5, Sec. 554 .....4, 25

United States Code, Title 5, Sec. 701 .....4, 22

United States Code, Title 5, Sec. 702 4

United States Code, Title 5, Sec. 706 4

United States Code, Title 28, Sec. 1254(1) 3

United States Code, Title 28, Sec. 1345 4

United States Code, Title 43, Sec. 321 4

United States Code, Title 43, Sec. 324 4

Page

United States Code, Title 43, Sec. 327 4
United States Code, Title 43, Sec. 328 4
United States Code, Title 43, Sec. 329 4
United States Constitution, Fifth Amendment 4

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UNITED STATES OF AMERICA, *Respondent,*

vs.

HOOD CORPORATION, *et al.*, *Petitioners.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Ollie Mae Shearman, the Estate of Charles Shearman, deceased, Hood Corporation, Hood-co Farms, Inc., Virginia Agricultural Products Corp., Indian Hill Irrigation Company, Wallace Reed, Myrtle M. Reed, Joseph L. Nielsen, Robert R. Schwarze, Raymond T. Michener and Marjorie K. Michener, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 4, 1973.

Opinions Below.

1. The first of many decisions involved in these proceedings was rendered by the Director of the Bureau of Land Management of the Department of Interior on August 14, 1964, wherein contests theretofore filed against pending applications for entry on desert lands were dismissed (Appendix A).

2. On May 25, 1966, the Chief Hearing Examiner for the Department of Interior issued a recommended decision (72 I.D. 386) reaching opposite conclusions from those of the Director on each issue. This decision was adopted by the Secretary of the Interior on December 30, 1966 (73 I.D. 386) (Appendix B).

3. There was no reported decision States District Court for the District of Idaho other than the Preliminary Decision filed on March 13, 1970 (Appendix C) and the Findings of Fact and Conclusions of Law (Appendix D) and Judgment (Appendix E) filed on July 10, 1970.

4. The opinion of the United States Court of Appeals reversing the District Court for the Ninth Circuit was entered on June 4, 1973, not yet reported (Appendix F).

5. The Order denying a Petition for Rehearing en banc was entered on July 27, 1973 (Appendix G).

Copies of the foregoing decisions and orders are filed herewith in a separate Appendix.

Jurisdiction.

1. The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 4, 1973, reversing a Judgment for the petitioners entered by the United States District Court for the District of Idaho on July 10, 1970.

2. The order denying petitioners' timely Petition for Rehearing was entered July 27, 1973.

3. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented for Review.

1. Whether the decision of the Court of Appeals for the Ninth Circuit (which decision is in clear conflict with its own prior decisions, decisions from other circuits and decisions of this Court) correctly interprets the Desert Land Act of 1877 as amended.

2. Whether the Secretary of the Interior is bound by the Administrative Procedure Act and the regulations of the Department of Interior, or whether he may properly ignore a final decision of the Department and arbitrarily order a new hearing.

3. Whether the Court of Appeals has read into the Desert Land Act requirements which the Congress did not intend.

4. Whether the District Court was correct in holding that the Secretary of Interior capriciously exceeded his authority in cancelling seven desert land entries that had not ripened into patents.

5. Whether the District Court was correct in holding that the Government had failed to prove fraud in its attempt to set aside patents.

Constitutional Provisions, Federal Statutes and Regulations Involved.

The following applicable constitutional provisions, Federal statutes and regulations are set forth in the incorporated Appendix:

1. Amendment V to the Constitution of the United States.
2. 5 U.S.C. §§552, 554, 701, 702 and 706.
3. 28 U.S.C. §1345.
4. 43 U.S.C. §§321, 324, 327, 328 and 329.
5. 43 C.F.R. 1843.9, 1844.1 and 2521.4(d).

Statement of the Case.

The District Court had jurisdiction to review a decision of the Secretary of Interior under the provisions of the Administrative Procedure Act (5 U.S.C. 701, *et seq.*) and to hear and determine an action whereby the Government sought to recover the title to and possession of lands (28 U.S.C. 1345).

The issues are of the utmost importance in that their resolution will determine whether millions of acres of federally-owned land are to lie fallow or whether they are to be rendered productive as envisioned by the Congress when the Desert Land Act of 1877 was adopted.

At this stage, the most accurate and concise statement of the case is found in the Findings of Fact of the District Court. They appear in their entirety in Section D of the separate Appendix. For convenience, the Findings, all clearly supported by the record, are summarized below.

In early 1961, Raymond T. Michener, Marjorie K. Michener, Norma E. Barnes, Charles E. Barnes, Blaine L. Garn, Wallace Reed, Joseph Nielsen, Robert R. Schwarze, Myrtle M. Reed and George L. Crapo applied for entry on lands located on the Indian Hill plateau in Owyhee County, State of Idaho.

On March 7, 1961, the Indian Hill Irrigation Company, a corporation, was formed to further the effort of obtaining irrigation facilities and the water necessary to irrigate the desert entries.

After attempting for almost two years to obtain a small projects loan from the Bureau of Reclamation and after numerous unsuccessful attempts to obtain financing for the development of the entries, the entrymen were able to make arrangements with Hood Corporation to provide interim financing thus enabling them to commence development. Initial contact with Hood Corporation was with Charles Shearman, an officer and major stockholder, on Feburary 15, 1963. Hood Corporation installed gas lines for the Intermountain Gas Company in Idaho and therefore was interested in establishing the feasibility of using natural gas engines for pumping water in high lift irrigation projects. Mr. and Mrs. Shearman also filed applications for entry.

Hoodco Farms, Inc. ("Hoodco"), an Idaho corporation, was incorporated on August 5, 1963 and on August 15, 1963 entered into agreements with the entrymen to develop the lands as necessary to obtain patents. By the agreements, Hoodco undertook to perform necessary development work on the individual entries to make them eligible for patent for $200.00 per developed acre. Simultaneously, each entryman entered into agreements with Indian Hill Irrigation Company whereby the irrigation company was to construct the

necessary joint irrigation works for $100.00 per developed acre. The latter agreement, though made August 15, 1963, was dated as of February 19, 1963, and superseded all previous contracts for the development of the project. Under its agreement, Hoodco was given the right to farm the land until full payment of the construction costs provided that so long as Hoodco farmed the land, an amount equal to one-twentieth of the cost of development would be credited annually against the obligations to Hoodco. The obligations of the entrymen to Indian Hill Irrigation Company under the February 19, 1963 agreement were also to be paid. The payment to Hoodco and Indian Hill Irrigation Company was evidenced by promissory notes and secured by mortgages which provided that there would be no recourse against the individual entryman for deficiency. The individual entryman could prepay the balance at any time and take over the full operation and control of his entry. Although the development of the entire project was made on a joint and cooperative basis, the irrigation system was so designed that each entry could be separately farmed and irrigated. Thus, the entrymen were able to obtain the financing to develop the land and to lease the land in order to meet the payments as they came due to Hoodco and Indian Hill Irrigation Company. The financing arrangement made it possible for Hoodco and Hood Corporation to recoup monies expended and to be expended in the development and furthered the business purpose of Hood Corporation to use the project to demonstrate the feasibility of gas engines on irrigation projects.

Prior to the issuance of patents, no contract was made by any of the entrymen for the sale of any of the entries involved.

All acts done by the entrymen, in the steps taken to acquire patents were done in good faith, and the final proof documents submitted were proper and complete and disclosed all information required by law. All requirements of the Desert Land Laws were met including, without limitation, water supply, cultivation, adequacy of irrigation systems and expenditures.

Charles R. Shearman died on April 27, 1964 and his widow, Ollie Mae Shearman, was appointed his Executrix.

On September 26, 1963, final proofs for the issuance of patents were filed by Messrs. Reed, Nielsen, Schwarze, Crapo and by Myrtle Reed.

On July 2, 1964, a contest was filed with the Department of Interior seeking to cancel the entries as having been obtained and held in violation of the Desert Land Act. The contest was grounded on the contention that the parties did not have the requisite intent, had not made the necessary expenditures in the development and reclamation of their entries, the arrangements between the entrymen and Hoodco constituted proscribed assignments, and the arrangements with Hoodco resulted in a holding of more than 320 acres.

By stipulation, properly entered into by counsel, the matter as to all entrymen except the Shearmans was presented through an agreed statement of facts and documentary evidence. No question has been raised as to the authority or propriety of government counsel to enter into a binding stipulation. The record includes a proposed supplemental agreement between the entrymen and Hoodco by which the entrymen and Hoodco undertook, if necessary, to clarify the agreements in effect. The entrymen further offered to consider any other modifications that might be proposed by the Government.

On August 14, 1964, the Director of the Bureau of Land Management acting for the Secretary, issued a decision favorable to the entrymen as to all issues without requiring or suggesting any modifications in the contractual arrangements then in existence. The decision was publicly applauded in a news release by the Secretary.

Thereafter, on September 4, 1964, the contests then pending against the Shearman entires were also dismissed based on the decision of August 14, 1964. No appeal was taken from the decision, nor from the order dismissing the contests against the Shearman entries.

Pursuant to the decision, patents were issued to Wallace Reed, Myrtle M. Reed, Joseph L. Nielsen, Robert R. Schwarze and George L. Crapo on September 3, 1964. In reliance upon the decision, Hoodco, Indian Hill Irrigation Company and the remaining entrymen continued to develop the entries at substantial expense.

On November 25, 1964, final proofs were filed by Messrs. Michener, Barnes, Garn, Marjorie Michener and Norma Barnes. On January 12, 1965, final proofs were filed on the Shearman entries.

On January 19, 1965, George L. Crapo and Melba O. Crapo, his wife, gave Virginia Agricultural Products, a corporation, an option to purchase the lands included in the Crapo entry. A warranty deed was executed on January 19, 1965 conveying these lands to Virginia Agricultural Products and was deposited in

escrow on January 22, 1965. The warranty deed was recorded on September 24, 1969.

On April 5, 1965, the solicitor of the Department of Interior in what the District Court termed "a most unusual and unprecedented action" issued an opinion which recited that it was unsound policy to dismiss the contest on the basis of the stipulated record, and further recited that even if the facts disclosed in the stipulated record were true, the Director's decision was incorrect on the law. This opinion was transmitted to the Secretary of Interior without notice to the entrymen. Thereafter, the Secretary of Interior issued an order directing that the decision of August 14, 1964 be set aside and that new proceedings be instituted.

Thereafter, complaints were again issued against Ollie Mae Shearman and the estate of Charles Shearman, deceased, and the complaints originally filed against the other entrymen were amended and a notice was issued to the patentees directing them to appear and present evidence with respect to the charges that their patents had been fraudulently obtained. The complaints embodied essentially identical charges to those that had been made in the 1964 contest proceedings.

On September 3, 1965, George L. Crapo and Melba O. Crapo executed a quitclaim deed to the United States of America covering their entry. The deed was recorded on March 22, 1968.

Prior to September 3, 1965, the Department of Interior was informed of the deed to Virginia Agricultural Products.

After lengthy hearings before a Hearing Officer of the Department of the Interior in 1965, opposite legal conclusions were reached, on an almost identical set of facts from those originally reached by the decision of August 14, 1964. On December 30, 1966, the Secretary of the Interior rendered a new decision cancelling the seven unpatented entries and directing that proceedings be taken to cancel the existing patents for fraud.

When the Secretary purported to set aside the September 14, 1964 decision, the only steps remaining for the issuance of patents were the ministerial acts of execution and delivery of patents, all of the statutory steps required for the irrigation and cultivation of the lands having been completed.

In January, 1968, Charles E. Barnes and Vera M. Barnes, husband and wife, Norma E. Barnes and Blaine Garn executed quitclaim deeds to the United States covering the lands included in their entries. They were recorded on August 14, 1968.

All of the mortgages entered into with Indian Hill Irrigation Company and Hoodco were recorded prior to September 3, 1965.

The issues now before this Court were presented to the United States District Court for the District of Idaho in two separate actions. In the first action (Civil Case No. 1-65-86), petitioners contended that the Secretary's decision of December 30, 1966 was erroneous, that the decision of August 14, 1964 was final and binding, and sought an adjudication establishing that the five

patents had been properly issued and that patents should promptly issue on the other seven entries.

The United States brought a separate action (Civil Case No. 1-67-97) seeking to have the petitioners ejected from the lands and a determination quieting title in the United States. The Government further sought approval of the decision of December 30, 1966 and prayed that the patents be set aside for fraud.

Both actions were consolidated for trial and it was stipulated that the entire administrative record was to be part of the trial record and considered by the trial court.

After preliminary rulings on specified legal issues on July 2, 1969, the actions were tried in the District Court of Idaho, Southern Division, on October 20 through October 24, 1969. After extensive briefing and further oral argument, judgment was entered July 10, 1970 dismissing the Government's complaint, ordering patents to issue to the entrymen and holding that the patents previously issued were free and clear from any claim of the United States.

The District Court further found:

(a) There is no procedure in the Department of the Interior or within the Federal statutes or regulations giving the Secretary of Interior the power to set aside the decision of August 14, 1964 or to conduct further proceedings.

(b) The actions of the Secretary were arbitrary, capricious and constituted an abuse of discretion and denial of due process of law.

(c) The rights of the entrymen constituted valuable property rights.

(d) Each entryman had the intention to reclaim the land for his own use and benefit at the time of the filing of his application for entry and at all times thereafter maintained the intent required by law.

(e) The contractual arrangements between Hoodco, the entrymen and Indian Hill Irrigation Company did not constitute assignments of the entries to Hoodco but represented a legal and proper financing plan for the joint development of the entries.

(f) As a result of said contractual arrangements, Hoodco became a mortgagee in possession of the lands and did not hold them in the capacity of an entryman.

(g) The quitclaim deeds were subject to all valid existing liens and encumbrances including the mortgages in favor of Indian Hill Irrigation Company and Hoodco.

REASONS FOR GRANTING THE WRIT.

The Writ should be granted for the following reasons:

1. The decision below is in clear conflict with other decisions of the Ninth Circuit as well as those of the Eighth Circuit and of this Court in determining what is necessary to obtain title to land under the Desert Land Act. Although these cases appear to affect only approximately 4,000 acres in Idaho, in fact, millions of acres of federally-owned land in the western part of the United States are directly affected by these proceedings. Since the issuance of the decision of the Secretary of Interior on December 30, 1966, literally no action has been taken on hundreds of pending applications for entry on desert lands and many pending contests remain unresolved awaiting the final determination of this controversy. If the interpretation given the Desert Land Act by the Court of Appeals for the Ninth Circuit is allowed to stand, millions of acres of otherwise productive land will remain arid and useless despite the clear mandate of the Congress prescribing the method by which such lands are to be rendered productive. The Department of Interior will have been allowed to substitute its judgment for that of the Congress. The refusal of the court below to follow its prior decisions as well as the long-standing decisions of other circuits and of this Court literally compels a review by this Court. It is only after this Court resolves these conflicts that the vital development of this vast reservoir of unproductive land (in the national interest as perceived by the Congress) can go forward with any certainty.

2. The decision of the Court of Appeals represents a radical departure from the accepted and usual course taken in judicial proceedings in that:

(a) The decision of the Court below is a shocking departure from established principles of appellate review in that findings of the trial court are ignored notwithstanding ample evidence supporting them and despite the fact that the burden of proof rested upon the Government and, in the view of the Judge who heard the evidence, was not met;

(b) The decision of the Court below renders nugatory the provisions of the Administrative Procedure Act and deprives those who deal with the Department of Interior of the security afforded by final departmental decisions and effectively denies access to the courts for their review;

(c) The decision of the Court below sanctions capricious, oppressive, arbitrary and unlawful conduct by the Department of the Interior and sanctions clear denials of due process of law.

A. The Court of Appeals' Decision Conflicts With Longstanding Authority.

The conflict between circuits, which we take this means of bringing to the attention of the Court is apparent from that portion of the Opinion of the Court below where, in referring to *United States v. Mackintosh*, 85 Fed. 333 (8th Cir. 1898), it is stated:

> "However, *Mackintosh* was decided before the enactment of certain amendments to the Desert Land Act and without the benefit of Supreme Court precedent construing the Act. We decline to follow it." (Appendix F, p. 148).

The decision reflects a misapprehension of the legislative history of the Desert Land Act and its interrelation with other statutes providing for the acquisition of federal lands.

This misapprehension should be placed in context. First, the Government has conceded that the entrymen had the requisite intent to enter the lands, irrigate and reclaim them for their own benefit when the applications for entry were filed. The thrust of the decision of the Court below is that there was an agreement for the sale of land made after proper application for entry and before the issuance of patents and that such an agreement is conclusive proof of fraud. Later in this Petition we will show that no such agreements existed. Nonetheless, assuming their existence, they are not fatal so long as the requisite intent obtained at the time the applications were filed.

The Eighth Circuit has squarely held that there was "nothing in the statute denouncing a mere intention on the part of the locator to transfer his or her title, when perfected. . . ." *United States v. Mackintosh, supra,* at page 338. Thus, in determining whether there was fraud in the submission of final proofs, the inquiry should be limited to whether the land has indeed been reclaimed by conducting water upon the entry as required by the statute. The Government, on the other hand, has contended throughout that the slightest hint of an intention to dispose of the land, whenever formed, must be disclosed.

The Desert Land Act, like the Timber Culture and Timber and Stone Acts of 1875, does not limit an entryman's right to make executory contracts for the sale of land after patent, nor require upon final proof an oath that no intention to do so exists. The Court below refers to the 1891 and 1908 amendments to the Act and attempts to torture a restraint upon alienation after patent into its provisions. The legislative history of the

1891 amendment reveals the error of this contention. Both the Homestead Act and the Desert Land Act were amended in 1891 by the same bill which provided for a restraint upon alienation under the Homestead Act but did not include such restraint in the Desert Land Act. *Act of March 31, 1891,* C.H. 561, §2, 26 Stat. 1096. There was precedent for this action by the Congress since in 1888 an effort to include a prohibition against sales in the Desert Land Act was rejected by the Congress. *H. R. Rep. No. 788,* 50th Cong., 1st Sess. (1888). Nor did the 1908 amendment to the Desert Land Act prohibit corporate financing of development or executory sale of lands before patent. The legislative history of the 1908 Act shows that Congress intended only to prohibit assignments of entries to a corporation. *S. Rep. No. 341,* 60th Cong., 1st Sess. (1908). Petitioners have never argued that an assignment to a corporation is valid but have urged that the financing arrangements made in these cases did not constitute an assignment and the District Court so held.

In *Adams v. Church,* 193 U.S. 410 (1904), involving the Timber Culture Act, this Court held that since the law did not require an affidavit before final certificate that no interest in the land had been sold, an agreement for such sale would not be fatal as long as the original entry had been made in good faith. This Court urged that, had Congress intended such result to follow, it would have so declared in the law. *Adams v. Church, supra,* at page 416.

In *United States v. Williamson,* 207 U.S. 425 (1908), involving the Timber and Stone Act, this Court struck down an administrative requirement that the applicant reaffirm that he had not arranged to, in effect, transfer any interest in his land at the time of final proof.

Here again this Court held that the approval of such an administrative requirement would have amounted to judicial legislation in the face of contrary Congressional mandate.

In *United States v. Biggs*, 211 U.S. 507 (1908), while condemning preexisting arrangements to sell made prior to original entry, this Court reaffirmed its position that absent express statutory provision to the contrary, there was no impropriety in arrangements for sale made at a later date. Please see also *United States v. Barber Lumber Co.*, 194 Fed. 24 (9th Cir. 1912), decided after the amendments to the Act, wherein the Ninth Circuit held there was no prohibition against a corporation's financing of reclamation even though coupled with an agreement to sell after patent, so long as the original entry was made in good faith. Please see also *United States v. Kettenbach*, 208 Fed. 209 (9th Cir. 1913), in which the Ninth Circuit confirmed that the controlling issue is ruled solely by the character of the primary application.

Moreover, the *Mackintosh* decision was approved and quoted at length by the Ninth Circuit in a similar case, *Connor v. United States*, 214 Fed. 522, pages 535-36 (9th Cir. 1914), in which the Ninth Circuit also noted that the Secretary of the Interior had approved and applied the *Mackintosh* holding in his own decisions (Alonzo B. Cole, 32 I.D. 420 (1907)).

If there was fraud in the acquisition of the lands in question it had, under existing law, to have occurred either at the time of application for entry through the absence of the requisite intent of the entrymen to reclaim the land for themselves or, by submitting false information or failing to disclose required and material facts in

the final proofs. As noted above, the Government has conceded that there was no fraud in the inception. Further, there was no fraud in the submission of final proofs. The Desert Land Act provides for the allowance of entries to qualified persons who enter the land intending to reclaim it by conducting water to it and upon payment of $.25 an acre. Within the time required, $3.00 per acre must be expended in the irrigation, reclamation and cultivation of the land. Upon satisfactory proof of reclamation and cultivation, and upon payment of the additional sum of $1.00 per acre, the entryman becomes entitled to a patent. There is no question but that these requirements of the law were met as disclosed by the final proofs.

Although other issues were raised in the contests, the disposition of the entire controversy now seems to rest on the holding of the Court of Appeals that there was fraud. The Court below impliedly concedes that, absent fraud, the earlier decision on the other grounds of contest should stand. To cancel the patents, the Government, of course, had to prove fraud by clear and convincing evidence. The Court of Appeals concludes that the Secretary had the power to set aside the 1964 decision, in any event, since, if the Secretary were obliged to issue the patents, he would only be bound to cancel them for the same fraud that would vitiate the patents already granted. The Court justifies the reopening by quoting from 43 C.F.R. §1843.9 (1965) which states:

> "When any party fails to appeal to the Secretary from an adverse decision of the Director, that decision shall as to such party be final and will not be disturbed except for fraud or gross irregularity."

The Court then states:

> "We approve the implicit finding of the Secretary that there was 'fraud or gross irregularity' in the original dismissal of the contest on a stipulated record which did not reveal *material facts*, as well as in the conduct of the patentees and developers." (Emphasis added) (Appendix F, p. 152).

Applying the quoted regulation, it is apparent that the 1964 decision must be regarded as final except for fraud or gross irregularity. The only new evidence introduced at the second administrative hearing consisted of (i) Exhibit G-115 which the Court below describes as a "somewhat cryptic handwritten memo" and which was found not to constitute an agreement by the District Court; (ii) a series of offers from Hoodco to certain of the entrymen dated August 15, 1963, which were never delivered to the entrymen; and (iii) an offer from Hoodco to Reed and Michener dated August 31, 1963 which was never accepted.

Thus, in the face of clear authority which provides that, absent a requirement to that effect in the statute, the law does not prohibit an agreement of sale, the Court below found an agreement based on an unenforceable cryptic memo, and offers which were either unproffered or unaccepted. After reaching this startling conclusion, the Court below then goes one step further and holds that this constitutes "virtually conclusive" evidence of fraud.

If this decision stands, the Court below will have written into the Desert Land Act provisions which the Congress, the trial and appellate courts and this Court have consistently refused to do to date. Moreover, the Court of Appeals has allowed its incorrect perception of requisite intent to do double duty through concluding that the Government is correct in its view that the

financing arranagements entered into were somehow also improper.

Thus, the Court below has literally made impossible the development of desert lands by those who need financing to develop their entries, despite the recognition by the Department that entries may be mortgaged for that purpose. 43 C.F.R. 2521.4(d). If this is to be the law, we submit that such a radical departure from precedent ought to be pronounced by this Court.

Parenthetically, we note that although the Court below speaks exclusively of the fraud of Hoodco, entrymen who still have rights under the financing arrangements of 1963 as well as patentees continue to be parties to this proceeding not only to protect valuable property rights but also to resist the charges that legitimate financing arrangements entered into in good faith and upon the advice of counsel can be translated into a fraud by them upon the United States. Petitioners do not believe that compliance with the law as pronounced by the highest courts should, because of a change in administrative policy, be branded as fraud.

B. The Lower Court Decision Departs From the Usual Course Taken in Judicial Proceedings.

1. *The Function of the Trial Court Has Been Completely Subverted.*

For the Government to prevail in its action for fraud, the evidence must be clear, unequivocal and convincing. *United States v. Barber Lumber Co.*, 172 Fed. 948, 956

(1909). As stated by the Interior Department in *Williams v. Kirk*, 38 I.D. 429 (1910) at page 432:

> "No mere suspicion of the good faith of the entrymen should be indulged, neither should the large property right granted be destroyed or withheld from the entrymen except upon convincing evidence of fraud."

Please see also, *United States v. Maxwell Land-Grant Co.*, 121 U.S. 325 (1887) quoted with approval by the Ninth Circuit in *Connor v. United States, supra,* at 529 wherein the Ninth Circuit concluded that there must be clear, unequivocal and convincing evidence before a patent may be cancelled for fraud. This authority notwithstanding, the Court of Appeals stated:

> "Despite the great weight to be accorded findings made by trier of fact upon disputed contentions of fact, we cannot escape the conclusion that the District Court here gave undue weight to the substantial investment of Hoodco in developing the lands." (Appendix F, p. 144).

In other words, despite the heavy burden of proof imposed on the Government and the finding of the trier of fact that it had not been met, the Court below deemphasizes facts which the District Court regarded as important. By stipulation, the District Court considered all of the proceedings at the two administrative hearings as well as direct testimony from the participants along with over four hundred exhibits. Having heard the testimony of those actively involved, and having concluded that efforts to finance the reclamation of the land were in good faith, the District Court's decision should be entitled to more than the lip service accorded it by the Court of Appeals.

2. ***Decisions of the Department of Interior Must at Some Stage Become Final and Are, in Any Event, Subject to Judicial Review.***

First, these proceedings arise out of questions relating to the interpretation of the Desert Land Act. The regulations issued pursuant to the Act provide for administrative hearings of disputes arising out of its administration. Secondly, the Congress has passed comprehensive legislation in the Administrative Procedure Act designed to safeguard the rights of persons appearing before administrative agencies and has further provided for judicial review of agency determinations (5 U.S.C. §701 *et seq.*).

Of course, the Secretary of Interior has broad powers of control and supervision. These, however, do not clothe him with any discretion to enlarge or curtail the substantive rights of the grantee nor to substitute his judgment for the will of the Congress. *Payne v. Central Pac. Ry Co.*, 255 U.S. 228 (1921). Please see also *United States v. United Verde Copper Co.*, 196 U.S. 207 (1904). In this case, we do not challenge the authority of the Secretary to determine what lands are available for entry or his authority to determine if the essential reclamation has taken place. He has those prerogatives. But in his administration of the public lands, he must comply with the standards set by the Congress. This he has failed to do.

3. *The Decision of the Court Below Sanctions Oppressive and Unlawful Conduct.*

Departmental regulations, as they read in 1965, provided that absent an appeal, the Director's decision shall be final except for fraud or gross irregularity. 43 C.F.R. 1843.9 (1964). They further provide that any

party adversely affected by a final decision of the Director may appeal to the Secretary. 43 C.F.R. 1844.1 (1965). The Government did not appeal the August 14, 1964 decision, and was thus foreclosed from challenging it. Despite this, the Government reopened the matter by filing an amended complaint and ordering a new hearing. There is no published regulation sanctioning this procedure despite the mandate of 5 U.S.C. §552 which provides:

> ". . . *No person shall in any manner be required to resort to organization or procedure not so published.*" (5 U.S.C. §552) (emphasis added).

The Department of the Interior is subject to the provisions of the Administrative Procedure Act. *Adams v. Witmer,* 271 F.2d 29 (9th Cir. 1959); *United States v. O'Leavy,* 63 I.D. 341 (1956). Thus the government not only violated its own regulations but acted by means of unauthorized procedures.

4. *It Was Error for the Government to Ignore Its Prior Stipulation.*

The decision of August 14, 1964 was rendered pursuant to a stipulation under the terms of which a final determination of the matters in dispute was to be made based upon a stipulated record. In the course of the trial in the District Court, it was shown that the stipulated record contained all of the matters complained of by the Government except certain immaterial facts which, under the law, could have no bearing on the issues. A stipulation authoritatively made on behalf of the United States Government must be adhered to in the same manner as any other stipulation. *United States v. Fallbrook Public Utility Dist.,* 165 F.Supp. 806 (S.D. Cal. 1958). Nor is it sufficient to say that the stip-

ulation could be ignored because of fraud, when no fraud was proved.

5. *The Government Was Correctly Estopped by the District Court.*

The Court of Appeals concluded that the Government could not be estopped from urging the same grounds of contest disposed of by the decision of August 14, 1964. Contrary to the statement made in the decision of the Court below, we do not contend that the Government should be estopped in this case as an exception to the general rule that the Government is not estopped to attack illegality. We contend that the Government should be estopped since the alleged grounds of illegality had previously been disposed of in a final decision of the Department of Interior. One need look no further than the Court of Appeals for the Ninth Circuit itself for well-considered opinions holding that the doctrine of estoppel may be applied against the Government where justice and good conscience dictate. Please see *United States v. Georgia-Pacific Co.*, 421 F.2d 92 (9th Cir. 1970); *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970).

6. *The Entrymen Have Been Deprived of Property Without Due Process of Law.*

It has long been recognized that an entryman has a property right particularly where he has done everything required to enable him to obtain a patent. *Noble v. Union River Logging R. Co.*, 147 U.S. 165 (1893). The execution and delivery of a patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty. *Pallinger v. U.S. ex rel. Frost*, 216 U.S. 240 (1910). A brief review of the procedural steps followed in these proceedings

conclusively shows that valuable property rights were taken without due process of law. After concluding on September 4, 1964, that all of the entrymen were entitled to patents, nothing official was done until April 5, 1965 when the solicitor sent a memorandum to the Secretary complaining about the decision without notice to the entrymen. This action by the solicitor of the Department of Interior constituted the very type of conduct that the Congress sought to prevent by the enactment of 5 U.S.C. §554 which provides that:

> "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, . . . participate or advise in the decision, recommended decision or agency review . . ."

Furthermore, the Hearing Officer at the second administrative hearing had before him the solicitor's memorandum to the Secretary and he could hardly have ignored the statements contained therein to the effect that even if the facts were as disclosed in the stipulated record, the Director's decision was incorrect as a matter of law. This type of unilateral conduct literally cries out for judicial sanctions.

The Court below dismisses our contention in this regard by pointing out that the communication between the solicitor and the Secretary was not unauthorized since there was no statutory or constitutional requirement that the Secretary's decision be preceded by a formal hearing. This, of course, overlooks the fact that there had been a formal hearing which had gone to final decision and the action of the solicitor amounted to nothing less than an unauthorized and untimely appeal from such decision without notice to the contestees.

Lastly, the Court below argues, in effect, that petitioners should not complain since the amounts expended in reliance on the 1964 decision are negligible compared to the value of the land. This statement is gratuitous and not supported by any evidence. Moreover, the only reason that the land has value at the present time is because of the improvements made by the petitioners in a good faith effort to finance the reclamation and irrigation of the land, upon the advice of counsel and in accordance with the long-standing law authorizing the financing of such reclamation.

Conclusion.

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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APPENDIX.

Constitutional Provisions, Federal Statutes and Regulations.

Amendment V—Constitution of the United States.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

5 U.S.C. §§552, 554, 701, 702 and 706.

5 U.S.C. § 552. *Public information; agency rules, opinions, orders, records, and proceedings*

(a) Each agency shall make available to the public information as follows:

(1) Each Agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any

agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 383; Pub.L. 90-23, § 1, June 5, 1967, 81 Stat. 54.

5 U.S.C. § 554. *Adjudications*

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make

the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 384.

5 U.S.C. § 701. *Application—Definitions.*

—(a) This chapter [§§ 701-706 of this title] applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter [§§ 701-706 of this title]—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix [see 22 §§ 2456 (a), 2457], and

(2) "person," "rule," "order," "license," "sanction," "relief," and "agency action" have the meanings given

them by section 551 of this title. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 392.)

5 U.S.C. §702. *Right of review.*—A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 392.)

5 U.S.C. § 706. *Scope of review*

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

28 U.S.C. §1345.

28 U.S.C. § 1345. *United States as plaintiff*

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress. June 25, 1948, c. 646, 62 Stat. 933.

43 U.S.C. §§321, 324, 327, 328 and 329.

43 U.S.C. § 321. *Entry right generally; extent of right to appropriate waters*

It shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of 25 cents per acre—to file a declaration under oath with the officer designated by the Secretary of the Interior of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one-half section, by conducting water upon the same, within the period of three years thereafter: *Provided, however,* That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of

irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said one-half section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the officer designated by the Secretary of the Interior of the reclamation of said tract of land in the manner aforesaid, and upon the payment to such officer of the additional sum of $1 per acre for a tract of land not exceeding three hundred and twenty acres to any one person, a patent for the same shall be issued to him. Except as provided in section 3 of the Act of June 16, 1955, as amended, no person may make more than one entry under sections 321-323, 325 and 327-329 of this title. However, in that entry one or more tracts may be included, and the tracts so entered need not be continguous. The aggregate acreage of desert land which may be entered by any one person under this section shall not exceed three hundred and twenty acres, and all the tracts entered by one person shall be sufficiently close to each other to be managed satisfactorily as an economic unit, as determined under rules and regulations issued by the Secretary of the Interior. Mar. 3, 1877, c. 107, § 1, 19 Stat. 377; Aug. 30, 1890, c. 837, § 1, 26 Stat. 391; Oct. 28, 1921, c. 114, § 1, 42 Stat. 208; Mar. 3, 1925, c. 462, 43 Stat. 1145; 1946 Reorg.Plan No. 3, § 403, eff. July

16, 1946, 11 F.R. 7876, 60 Stat. 1100; Aug. 14, 1958, Pub.L. 85-641, § 1, 72 Stat. 596.

43 U.S.C. § 324. *Assignment of entries*

No assignment after March 28, 1908, of an entry made under sections 321-323, 325 and 327-329 of this title shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said sections of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized. Mar. 28, 1908, c. 112, § 2, 35 Stat. 52.

43 U.S.C. § 327. *Filing irrigation plan—Association of entryman.*—At the time of filing the declaration hereinbefore [in § 321 of this title] required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements. (Mar. 3, 1877, c. 107, § 4, as added Mar. 3, 1891, c. 561, § 2, 26 Stat. 1096.)

43 U.S.C. § 328. *Expenditures and cultivation required.*—No land shall be patented to any person under this act [§§ 321-323, 325, 327-329 of this title] unless he or his assignors shall have expended in the necessary

irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: Provided, That proof be further required of the cultivation of one-eighth of the land. (Mar. 3, 1877, c. 107, § 5, as added Mar. 3, 1891, c. 561, § 2, 26 Stat. 1096.)

43 U.S.C. § 329. ***Issue of patent on final proof; citizenship requirement as to patentee; limit as to amount of holding***

At any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the officer designated by the Secretary of the Interior of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to such officer of the additional sum of $1 per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands, but this section shall not apply to entries made or initiated prior to March 3, 1891: *Provided, however,* That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under sections 321-323, 325 and 327-329 of this title shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States. Mar. 3, 1877, c. 107, § 7, as added Mar. 3, 1891, c. 561, § 2, 26 Stat. 1096, and amended Oct. 28, 1921, c. 114, § 1, 42 Stat. 208; Mar. 3, 1925, c. 462, 43 Stat. 1145; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.

43 C.F.R. 1843.9, 1844.1 and 2521.4(d).

43 C.F.R. 1843.9 (1964):

"When any party fails to appeal to the Secretary from an adverse decision of the Director, that decision shall as to such party be final and will not be disturbed except for fraud or gross irregularity."

43 C.F.R. 1844.1 (1965):

"Any party adversely affected may appeal to the Secretary of the Interior from a final decision of the Director, whether such final decision is on an appeal or is an original decision, except from such a decision which, prior to a promulgation has been approved by the Secretary. . . ."

43 C.F.R. 2521.4(d) (1970):

"A desert-land entryman may, however, mortgage his interest in the entered land if, by the laws of the State in which the land is situated, a mortgage of land is regarded as merely creating a lien thereof and not as a conveyance thereof. The purchaser at a sale had for the foreclosure of such mortgage may be recognized as assignee upon furnishing proof of his qualifications to take a desert-land entry by assignment. Transferees, after final proof, mortgagees, or other encumbrances may file in the proper land office written notice stating the nature of their claims, and they will thereupon become entitled to receive notice of any action taken by the Bureau of Land Management with reference to the entry."